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MICHAEL RODAK, JR., CLERK

No. 79-1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LOUIS PEREZ,

Petitioner,

against

ARYA NATIONAL SHIPPING, LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION OF LOUIS PEREZ FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. On the facts of petitioner, Louis Perez' longshoreman's personal injury case, subject to the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act (hereinafter "LHWCA"), 33 U.S.C. § 901 *et* seq. (1927), an assignment having occurred by operation of LHWCA § 933(b) by virtue of petitioner's failure to bring suit against "third-party" petitioner within six months from an "award" of controverted compensation benefits pursuant to a formal order of the United States Department of Labor, District Deputy Commissioner, should: (a) the assignment be given effect to deny petitioner's right to sue on the basis of respondent's Fed.R.Civ.P. 17 real party in interest defense; or, (b) be denied effect because of a presumption of the existence of a sufficient "conflict of interests" between petitioner and his employer by virtue of the failure, for whatever reason, of the employer to sue respondent in petitioner's right to recover damages on account of the injury for which petitioner has received compensation?

2. Are the issues in this petitioner's case, involving a formal order awarding compensation benefits, fully subsumed in the petition of Frederico Rodriguez (also filed under Index No. 79-1977), making the granting of a writ of certiorari in this related case inappropriate for that reason?

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Statutes

Longshoremen's and Harbor Workers' Compensation Act:

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Respondent respectfully requests this Court deny the petition for writ of certiorari to review the unanimous decision of the United States Court of Appeals for the Second Circuit dated March 19, 1980 (1d)[1] affirming the opinion of the United States District Court, Southern District of New York (468 F. Supp. 799) and final order of August 10, 1979 dismissing this longshoreman's personal injury suit on grounds of § 933(b), the LHWCA "assignment" provision.

1. References followed by the letters "f" and "d" are to be found in the Supplemental Appendix.

STATUTES INVOLVED

Involved in this case are Fed.R.Civ.P. 17(a), the "real party in interest" rule, and LHWCA § 933(b) which provides as follows:

> (b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

STATEMENT OF THE CASE

This action[2] involves a claim for damages for personal injury sustained by petitioner, Louis Perez, a longshoreman employed by Universal Terminal and Stevedoring Corp. (hereinafter the employer) in August 1973 (2f). In March 1975 the District Deputy Commissioner, Workmen's Compensation Board entered a formal order awarding petitioner compensation under the LHWCA (*id.*) which he accepted. Some fifteen months later, petitioner commenced the within action against respondent, the owner of the vessel aboard which he sustained the injuries for which compensation was paid (*id.*)[3]. In November 1978 respond-

2. *Perez* v. *Arya National Shipping Line, Ltd.,* Second Circuit Court of Appeals Index No. 79-7632. This appeal was argued jointly with a number of others involving the same or similar issues, although never consolidated by the Second Circuit. Nonetheless, Perez presents his petition joined with that of two other longshoremen/plaintiffs in a single petition filed under one index number. One, at least, of these, Rodriguez' petition, involves all the issues here presented.

3. This injury was diagnosed by petitioner's initial treating doctor as "contused abrasion of the left ankle," for which plaintiff was awarded compensation, for temporary, total and permanent, partial disability, of $5,560.83. He was allegedly totally disabled as a result of his injury for 7 6/7 weeks.

ent moved pursuant to Fed.R.Civ.P. 12, 17 and 56 for an order pursuant to LHWCA § 933(b) dismissing the case on grounds that petitioner's third-party claim against respondent had been assigned to his employer six months after his acceptance of additional compensation pursuant to the Deputy Commissioner's order. This motion was denied by opinion and order of the United States District Court, Southern District of New York (Hon. Morris E. Lasker) without prejudice to renewal after forty-five days, the time alloted by the Court to petitioner to submit evidence of the existence of a conflict of interests between himself and his employer sufficient to deny the assignment of his cause of action effect.[4]

In July 1979, respondent renewed its motion to dismiss, petitioner having taken no steps to prove an actual conflict of interest. On August 10, 1979 respondent's summary judgment motion was granted, from which final order petitioner appealed. The order of the district court was affirmed by the Second Circuit Court of Appeals March 19, 1980 ". . . for the reasons stated in [the Second Circuit Court of Appeals'] opinion in the case of *Frederico Rodriguez* v. *Compass Shipping Co., Ltd. and Djakarta Lloyd P.N.*, Docket No. 79-7132." (1d).

REASONS FOR DENYING WRIT

Respondent urges that the petition be denied for reasons stated in the brief of respondents' Compass Shipping

4. Although not mentioned in the District Court's opinion, (properly so since it did not conform to the requirements of Fed.R.Civ.P. 56), petitioner submitted an attorney's hearsay affidavit in opposition to respondent's motion in which the employer's insurer's "claims attorney" was quoted to the effect that the employer's insurer (subrogated to the employer's interest by virtue of LHWCA § 933(h)) did not intend to sue out of "fear that [suit] . . . would adversely effect . . . [the employer's] economic relationship with the steamship company."

Co., Ltd. and Djakarta Lloyd P.N. in opposition to the petition of Frederico Rodriguez for writ of certiorari (Index No. 79-1977). In addition, respondent urges that the petition in this case need not be considered, and should not be granted, because all issues important to this petition are before the Court in the petition of Frederico Rodriguez. In that case *no* formal order of the District Deputy Commissioner was ever entered, a fact which the Second Circuit Court of Appeals, in upholding dismissal of that case on grounds of the §933(b) assignment, found not significant.

This case *does* involve a formal order and the "procedural" issue raised in the Rodriguez' petition is, hence, not present. All aspects of the issues common to both: the question of "revestiture" of the cause of action as a result of the employer's failure to bring suit against respondent, and/or the correctness of the holding giving effect to the LHWCA §933(b) assignment despite the employer's apparent disinclination to sue, are presented in the companion Rodriguez petition. As in Rodriguez, Perez, despite opportunity extended by the district court to prove an actual conflict of interests, did not do so. In fact, the same presumed motive, the apparent policy of employers, for customer relations reasons, not to sue on the §933(b) assignment is presented in this case as an alleged sufficient "conflict of interests" so as to avoid giving the assignment effect. This issue is argued in the Rodriguez petition. There being absolutely no additional issues to be considered by this petition, it should be in any event denied.

CONCLUSION

Since consideration of this petition is unnecessary in order to determine any of the issues presented in this or the companion petition of Frederico Rodriguez, it should be in any event denied.

Dated: New York, N. Y.
July 14, 1980

Respectfully submitted,

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